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No. 10-742

In the Supreme Court of the United States

BNSF RAILWAY COMPANY,
Petitioner,
v.
SURFACE TRANSPORTATION BOARD AND UNITED STATES OF AMERICA; BASIN ELECTRIC POWER COOPERATIVE, INC.; AND WESTERN FUELS ASSOCIATION, INC.
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENTS BASIN ELECTRIC POWER COOPERATIVE, INC. AND WESTERN FUELS ASSOCIATION, INC. IN OPPOSITION

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QUESTIONS PRESENTED

In 2004, BNSF exerted its monopoly power by attempting to unilaterally impose one of the largest rate increases in the history of American railroading on WFA's captive coal traffic. WFA, a non-profit cooperative, filed a rate complaint at the STB on October 19, 2004 and proceeded to expend over $8 million to prove its entitlement to rate relief. Not long before the Board's February 2009 decision that partially reduced BNSF's massive rate increase, BNSF argued for the first time that WFA's rate complaint case had been dismissed automatically on October 19, 2007 by operation of 49 U.S.C. § 11701(c), a statute that the agency and its predecessor had consistently construed for over 25 years as not applying in shipper-initiated rate cases. The Board rejected BNSF's Section 11701(c) objection in its February 2009 decision, but it did not address WFA's separate contention that BNSF had waived the objection by not presenting it in a fair or timely manner. The questions presented for review are:

1. Whether BNSF forfeited its objection to the STB's failure to treat the rate complaint brought by WFA as automatically dismissed pursuant to 49 U.S.C. § 11701(c) as of October 19, 2007 by waiting until July 14, 2008 to first raise the objection.

2. Whether the STB and WFA could rely on BNSF's forfeiture when (i) the Board never acquiesced in BNSF's Section 11701(c) objection, (ii) the Board rejected the objection at its first opportunity to do so, and (iii) the Board did not address whether BNSF had waived the objection, though requested to do so.

CORPORATE DISCLOSURE AND RULE 29.6 STATEMENT

Basin Electric Power Cooperative, Inc. ("Basin") is a North Dakota electric generation and transmission cooperative association. Basin has no corporate parent, and no publicly-held company has a 10% or greater ownership interest in Basin.

Western Fuels Association, Inc. ("WFA") is a Wyoming nonprofit corporation that supplies coal to its members. WFA has no corporate parent, and no publicly-held company has a 10% or greater ownership interest in WFA.

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OPINIONS BELOW

The opinion of the court of appeals is reported at 604 F.3d 602. Pet.App.1a-22a. The three Surface Transportation Board ("STB" or "Board") decisions reviewed by the court of appeals are unreported and are available at 2009 WL 415499 (Decision served Feb. 18, 2009); 2009 WL 1567606 (Decision served June 5, 2009); and 2009 WL 2221011 (Decision served July 27, 2009). Portions of these decisions are reproduced at Pet.App.32a-54a.

JURISDICTION

The judgment of the court of appeals was entered on May 11, 2010. The court of appeals denied petitions for rehearing on September 2, 2010. Pet.App.57a-60a. The petition for a writ of certiorari was filed on December 1, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

When it became clear some three and three-quarter years into a complex STB rate case that the Board was likely to roll back a portion of BNSF Railway Company's ("BNSF") proposed $1 billion rate increase on Western Fuels Association, Inc.'s ("WFA") coal traffic, BNSF argued for the first time that WFA's case was automatically dismissed seven months earlier under an obscure federal statute, 49 U.S.C. § 11701(c), that the STB had consistently

held had no application in rate cases initiated by shippers. The STB found BNSF's Section 11701(c) claims meritless, and, when BNSF sought review of this determination, the court of appeals held that BNSF had forfeited its statutory objection by not first raising it in a timely manner before the Board. In so holding, the court of appeals correctly applied settled law to the unique facts of this case, and its fact-bound finding of forfeiture does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

Background Facts and Proceedings Below

WFA is a non-profit cooperative that buys coal and coal transportation for its members. Basin Electric Power Cooperative, Inc. ("Basin") is a non-profit cooperative that generates and transmits electricity to 120 member rural electric systems, and is a member of WFA. Collectively, WFA and Basin are referred to as "WFA."

Along with five other non-profit and municipal entities, Basin owns and operates, and WFA provides and arranges for transportation of coal to, the Laramie River Station ("LRS"), a coal-fired electric generating station located near Wheatland, Wyoming. LRS supplies electricity to over 200 non-profit member cooperative, municipal, and public power systems that distribute the power to businesses, farmers, ranchers, and other consumers in nine Great Plains states. JA15-16, 43-45, 54.[1]

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[1] "JA__" refers to the Joint Appendix filed with the court of appeals.

LRS burns approximately eight million tons of coal annually, all of which originates from coal mines in the Wyoming Powder River Basin ("PRB") and is transported by BNSF from the PRB to LRS, a distance of approximately 200 miles. Pet.App.24a. BNSF exerts monopoly pricing power over the PRB-to-LRS service because rail service is the only viable transportation option and BNSF is the sole rail carrier serving LRS. *Id.* The freight rates WFA pays to BNSF are ultimately passed through to its rural consumers as part of their monthly electric bills. JA50.

Shortly after LRS went into commercial service, BNSF and WFA entered into a 20-year coal transportation contract for the PRB-to-LRS service. This contract was a very lucrative one for BNSF, as BNSF earned over $311 million in profits under it. JA46. Nevertheless, when the contract expired in September of 2004, BNSF unilaterally imposed massive rate increases on the LRS traffic under a common carrier tariff. WFA estimated that, left unchecked, payment of BNSF's tariff rates would increase its freight charges by $1 billion over the next 20 years (JA49) and produce rates with revenue-to-variable cost ratios starting at 481% and increasing over time to 843%. Pet.App.6a. The ultimate payor of these massive rate increases would be the customers served by LRS, who for the most part are small ranchers, farmers, households and businesses.

Left with no other option, WFA turned to the STB as its last line of defense against BNSF's monopoly pricing abuses. On October 19, 2004, WFA filed a complaint at the STB under 49 U.S.C. § 11701(b) alleging that BNSF exerted "market dominance" as defined in 49 U.S.C. § 10707 over the transportation of its coal from the PRB to LRS and that BNSF was exerting its dominant market power to impose rates that exceeded a reasonable maximum in violation of 49 U.S.C. § 10701(d)(1) and 49 U.S.C. § 10702(1). WFA requested that the Board accept its complaint, conduct a full hearing under 49 U.S.C. § 10704(a)(1), and at the conclusion of that hearing, exercise its authority under 49 U.S.C. §§ 11704(a)(1) and 11704(b) to prescribe maximum reasonable rates on the PRB-to-LRS service and to order BNSF to pay reparations to WFA equal to the unlawful payments WFA had made under BNSF's tariff while its complaint was being adjudicated by the Board. JA13-19.[2]

The Board accepted WFA's complaint and began conducting a full hearing under procedural schedules agreed upon by the parties and adopted by the Board. In the ensuing proceedings before the Board, BNSF conceded that it exerted market dominance over WFA's traffic, and WFA claimed it was entitled to substantial rate relief under the Board's "stand-alone cost" ("SAC") standard. JA312.

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[2] The case was docketed at the Board as Docket No. 42088, *Western Fuels Ass'n, Inc. and Basin Elec. Power Coop. v. BNSF Ry.*, STB Docket Nos. 42088 and 42088 (Sub-No. 1) ("*WFA*").

The SAC test was promulgated by the STB's predecessor, the Interstate Commerce Commission ("ICC"), in 1985, and thereafter applied and fleshed-out in a series of maximum rate cases at the ICC and, after the ICC was sunset in 1995, the STB. JA106. The SAC test sets the maximum rate that a hypothetical highly efficient, least-cost competitive carrier, operating in a contestable market with no barriers to entry, would charge to serve the issue traffic. JA183. The SAC test calls for the complainant shipper to model a hypothetical railroad, called a stand-alone railroad ("SARR"), that provides origin-to-destination service for the issue traffic (in the *WFA* case, from the PRB-to-LRS), and, at the complainant shipper's election, service to other customers in a traffic group, in a manner that maximizes revenues for the SARR and minimizes the SARR's costs. JA105-06.

Under the standards in effect when WFA filed its case in 2004, a shipper was entitled to rate relief if the revenues the SARR was projected to earn over a 20-year period exceeded, on a net present value basis, the costs of building and operating the SARR over the same period (including a reasonable return on investment). JA237. The amount of relief was determined by applying what the Board called its percent reduction method. For example, if SARR revenues exceeded SARR costs in a particular year by 20%, the challenged rate for that year would be reduced by 20%. JA185.

In early 2005, WFA used advanced computer modeling techniques to design a SARR that maximized revenues and minimized costs. In

calculating its SARR revenues, WFA relied on Board case law precedents, including the mileage-prorate procedures the Board had used in the last nine SAC cases to calculate revenues for "cross-over" SARR traffic – traffic that moves over the SARR but then is hypothetically interchanged with the defendant carrier for movement beyond the SARR. JA38. This calculation was critical because WFA developed a SARR where 96% of the SARR's traffic was cross-over traffic. JA307, 335.

WFA presented its SARR revenue and cost calculations in opening and rebuttal filings made in 2005. In these filings, WFA demonstrated it was entitled to substantial rate relief because its SARR's revenues exceeded SARR costs by approximately 45%. JA307. Final briefs were filed in December 2005, and the case was then ripe for decision by the Board. Pet.App.6a-7a. However, the Board did not decide the case. Instead, in February of 2006, it issued an order holding the *WFA* case "in abeyance" pending the Board's initiation and completion of a rulemaking proceeding, *Major Issues in Rail Rate Cases*, STB Ex Parte No. 657 (Sub-No. 1), 2006 WL 3087168 (STB served Oct. 30, 2006) ("*Major Issues Rulemaking*") where, among other things, the Board proposed to replace the mileage-prorate method to set cross-over traffic revenues with a new method, called Average Total Cost ("ATC"), and to retroactively apply ATC in the *WFA* case. JA102, 119. WFA immediately requested that the Board terminate the *Major Issues Rulemaking*, and decide its case on the closed administrative record. JA143-51. BNSF opposed WFA's request, arguing, *inter*

alia, that the delays caused by the rulemaking would not prejudice WFA. JA578. The Board denied WFA's request. JA161.

In the ensuing rulemaking proceeding, WFA repeatedly argued that it was unfair, and unlawful, for the Board to retroactively apply ATC in its case because WFA would have designed a different SARR using the ATC revenue allocation method. JA166, 171, 174. The Board had three responsive choices here – not apply ATC in the *WFA* case, apply ATC in the *WFA* case to the existing SARR, or apply ATC, but permit WFA to revise its SARR. Initially, the Board chose the second option. The Board adopted ATC in its final decision in the *Major Issues Rulemaking* served on October 30, 2006 (JA207-09), and one month later, in its decision reopening the *WFA* case, the Board directed the parties to recalculate SARR revenues using ATC as applied to the existing SARR (JA257).[3] WFA continued to object in the reopened *WFA* proceedings to the Board's retroactive application of ATC, asserting the same argument it had raised in the rulemaking proceeding – WFA would have designed a different SARR using ATC. JA287, 291, 295, 298.

In a decision served on September 10, 2007 ("*September 2007 Decision*"), the Board found that the retroactive application of ATC reduced WFA's initial calculation of SARR revenues using mileage-prorate method so much that its SARR revenues did not exceed its SARR costs. JA324. However, the

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[3] The Board had also ordered WFA and BNSF to submit additional supplemental SARR evidence during the pendency of the *Major Issues Rulemaking* using the existing SARR. JA 140.

Board also found that "the change from [mileage prorate] to ATC would affect the basic design of a SAC case" (Pet.App.30a) and that WFA had not had a "fair" opportunity to present its case since the Board had not permitted WFA to revise its SARR (Pet.App.26a, 30a). The Board then ruled that if WFA elected to do so, the Board would keep the record open to permit WFA to revise its SARR. Pet.App.31a. Finally, the Board ruled that the parties should raise all objections to the Board's decision in petitions for reconsideration. Pet.App.31a n.28.[4]

BNSF filed a petition for reconsideration. In that petition, BNSF objected to the Board's decision to permit WFA to revise its SARR. BNSF also argued it was "unfair" to extend the case, but did not argue that the Board lacked jurisdiction to do so. JA446, Pet.App.16a. The Board denied BNSF's petition for reconsideration; WFA informed the Board that it would submit a revised SARR; and the parties agreed on a procedural schedule for submission of revised SARR evidence. JA475, 478. In accordance with that schedule, WFA presented its revised SARR, and supporting evidence, on May 13,

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[4] The Board also relied on its *September 2007 Decision* in judicial review proceedings brought by WFA in the court of appeals challenging the Board's decision in the *Major Issues Rulemaking* to retroactively apply ATC in *WFA*. The court of appeals held that the Board could retroactively apply ATC in the pending *WFA* case, so long as WFA was given a fair opportunity to present conforming evidence, and noted that the Board had given WFA this opportunity in its *September 2007 Decision*. *See BNSF Ry. v. STB*, 526 F.3d 770, 784 (D.C. Cir. 2008).

2008. JA491. This evidence showed that the revised SARR's revenues substantially exceeded the revised SARR's costs, and that WFA was entitled to substantial rate relief under the Maximum Markup Methodology ("MMM") the Board had adopted in its *Major Issues Rulemaking* rulemaking proceeding to replace the percent reduction method. JA494. Under MMM, SARR relief is allocated using demand elasticity principles among qualifying members of the SARR traffic group. JA189.

BNSF responded to WFA's revised SARR evidence in a reply filed with the Board on July 14, 2008. In that filing, BNSF argued for the first time that WFA's case was automatically dismissed on October 19, 2007 by operation of law under 49 U.S.C. § 11701(c) – three years to the day after WFA's complaint was filed. Pet.App.9a, JA532-35. In its rebuttal, filed with the Board on August 15, 2008, WFA presented three responsive arguments to BNSF's automatic dismissal contentions. First, WFA argued that the Board, and the ICC, had consistently and correctly construed the automatic dismissal rule set forth in Section 11701(c) as not applying in shipper-initiated maximum rate cases, citing *inter alia*, *AEP Texas North Co. v. BNSF Railway Co.*, STB Docket No. 41191 (Sub-No. 1), 2006 WL 3290425 at *2 (STB served Nov. 13, 2006) ("*AEP Texas*") (JA261-65) (Section 11701(c) applies "only to investigations begun by the agency on its own initiative . . . not those begun on complaint"); *Complaints Filed Pursuant to the Savings Provisions of the Staggers Rail Act of 1980*, 367 I.C.C. 406, 407-12 (1983) ("*1983 Interpretation*") (same). JA576.

Second, WFA argued that if the three-year dismissal rule applied, its application impermissibly deprived WFA of due process of law because WFA was not accorded a fair hearing, nor a final decision, before October 19, 2007, due to agency delays it did not cause, citing, *inter alia*, *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 437 (1982) ("*Logan*") (automatic statutory dismissal of a party's cause of action before it is heard and decided by an agency, due to no fault of the party, violates due process). JA577. Finally, WFA argued that BNSF had waived its automatic dismissal arguments by not raising them in a fair or timely manner before the Board, citing, *AEP Texas*, 2006 WL 3290425 at *5 (Board finds that BNSF "waived" its Section 11701(c) automatic dismissal contentions first raised 16 days prior to the putative three-year dismissal date). JA578.

In a series of three decisions served in 2009, the Board found that the revised SARR's revenues exceeded the revised SARR's costs and that WFA was entitled to rate relief under the Board's new MMM standards. JA614, 643, 671, 674. The Board prescribed maximum reasonable rates and awarded WFA approximately $120 million in reparations. JA685. While affording substantial rate relief to WFA, the rates prescribed by the Board were substantially higher than the expiring contract rates, and produced revenue-to-variable cost ratios in the 250% range. JA675. Rates at these levels permit BNSF to continue to earn very high profits on the LRS coal movement. JA675.

The Board also addressed and rejected BNSF's automatic dismissal claims in the first of its 2009 rate decisions, served on February 18, 2009. JA610. In that decision, the Board concluded, consistent with 25 years of Board/ICC precedent, that the three-year automatic case dismissal rule set forth in Section 11701(c) does not apply to rate complaint cases initiated by shippers. JA621. Finally, the Board reaffirmed its prior ruling that due process required the Board to provide WFA the opportunity to revise its SARR. JA615.

BNSF filed petitions for review of the Board's three 2009 rate orders in the court of appeals. In these petitions, BNSF challenged many of the Board's SAC rulings and argued, as it had before the Board, that WFA's rate case was automatically dismissed under Section 11701(c) on October 19, 2007. Pet.App.2a. Prior to oral argument, the court of appeals asked the Board to address two issues at oral argument: (1) whether BNSF forfeited its Section 11701(c) contentions by waiting until July 14, 2008 to first raise them and (2) whether the Board had forfeited this argument by failing to raise it in its brief. Pet.App.55a.

The STB, joined by WFA, argued that BNSF had forfeited its Section 11701(c) contentions by not raising them in a timely manner before the Board and that the STB had not forfeited these contentions by not raising them in its brief. Transcript of Oral Argument ("Oral Arg. Tr.") at 34-37, 48, ECF No. 1245411; Pet.App.11a. The court of appeals panel, comprised of Circuit Judges Henderson, Rogers, and Garland, agreed. In a unanimous opinion, the court

of appeals held that resolution of the question of whether BNSF had forfeited its Section 11701(c) objection was governed by the longstanding rule adopted by this Court over 50 years ago in *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952) ("*Tucker Truck*"), and consistently followed thereafter, that "[a] reviewing court generally will not consider an argument that was not raised before the agency at the time appropriate under its practice." Pet.App.15a (internal quotation omitted). The court of appeals found that by waiting some nine months after the putative three-year dismissal date to first raise the dismissal argument, BNSF had "forfeited the statutory argument by failing to raise it in a timely manner before the Board" (Pet.App.2a), just as BNSF had three years earlier in *BNSF Railway Co. v. STB*, 453 F.3d 473 (D.C. Cir. 2006) ("*Xcel*"). In *Xcel*, the court held that BNSF forfeited an identical Section 11701(c) dismissal contention in a coal rate case by waiting until six months after the putative three-year statutory deadline before first raising the contention at the STB. Pet.App.15a-17a.

The court of appeals also found that the Board had not forfeited its right to rely on BNSF's forfeiture because the Board "had never acquiesced in BNSF's view" that WFA's rate case was automatically dismissed on October 19, 2007 and had "rejected BNSF's argument on the merits when it was first raised in July 2008." *Id.* at 17.

In light of its forfeiture rulings, the court of appeals did not resolve the merits of BNSF's Section 11701(c) claims, but did set forth the parties' positions on the statutory and constitutional issues

raised, including the arguments made by WFA and the STB that dismissal of WFA's rate case on October 19, 2007 would have violated WFA's basic due process rights to a fair hearing and final merits decision. Pet.App.11a-14a. While not deciding these issues, the Court observed that "[t]he Board's concern with due process may be well founded." Pet.App.14a (internal quotation omitted) (citing *Logan*).

After finding BNSF's automatic dismissal arguments forfeit, the court of appeals rejected all of BNSF's SAC contentions, except one involving the Board's ATC methodology. The court remanded without vacating the Board's decision for the Board to address this contention. Pet.App.18a-22a. BNSF petitioned for panel and en banc rehearing. These petitions were denied on September 2, 2010. Pet.App.57a-59a.

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

BNSF asks this Court to review the court of appeals' finding that BNSF forfeited its Section 11701(c) automatic dismissal contentions by not presenting them in a timely manner to the STB. In making this request, BNSF concedes that under the settled *Tucker Truck* rule, the court of appeals could find BNSF's Section 11701(c) objection forfeit if the argument was not raised in a timely manner before the STB, but argues that the court of appeals erred in applying the *Tucker Truck* standard in this case. This Court rarely grants a petition for a writ of

certiorari when the asserted error consists of the misapplication of settled law and, in any event, the court of appeals correctly found, as the STB had requested, that BNSF's Section 11701(c) contentions were not timely raised before the Board.

Alternatively, BNSF seeks review on grounds that the court of appeals erred in not finding BNSF's forfeiture excused because the Board rejected BNSF's Section 11701(c) contentions solely on the merits without also addressing whether the contentions were timely raised. The court of appeals properly exercised its discretion in rejecting this contention. BNSF points to some disagreement among the courts of appeals concerning the resolution of forfeiture-of-forfeiture issues arising in cases involving federal employment discrimination claims and immigration law claims, but BNSF has not shown that any court of appeals would have decided this case differently. Nor is this case an appropriate vehicle to consider forfeiture-of-forfeiture issues arising in federal employment discrimination cases or in immigration cases, as the resolution of these issues turns on the intricacies of federal employment and immigration law not present in this case.

Finally, BNSF asserts that review is necessary because the forfeiture issues it raises, along with the merits of its forfeited statutory objection, raise important and recurring issues. In fact, the forfeiture issues BNSF raises have arisen in only two cases involving review of STB orders, and, as discussed above, the two courts of appeals rejected the forfeiture rule BNSF asks this Court to

adopt. Similarly, the STB has consistently held that the three-year automatic dismissal rule set forth in Section 11701(c) does not apply in shipper-initiated maximum rate cases, and this longstanding construction has been challenged in recent years by only one carrier, BNSF, and then only unsuccessfully in the form of a gimmick, sandbagged defense raised in three on-going STB rate cases either long after, or just before, the asserted three- year automatic dismissal date, in a transparent effort to deprive the complainant shippers of their due process rights to a fair and final decision on the merits of their complaints.

I. THE COURT OF APPEALS CORRECTLY APPLIED SETTLED LAW IN FINDING BNSF FORFEITED ITS SECTION 11701(c) AUTOMATIC DISMISSAL CONTENTIONS

The court of appeals determined that BNSF's Section 11701(c) objection was forfeit by applying the longstanding and settled principle, first adopted by this Court in its 1952 decision in *Tucker Truck*, and consistently adhered to thereafter, that "[s]imple fairness to those who are engaged in the tasks of administration, and to litigants, requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice." *Id.*, 344 U.S. at 37. "On this underlying principle of administrative law, the Court is

unanimous." *Woodford v. Ngo*, 548 U.S. 81, 90 (2006) (quotation marks and citation omitted).

BNSF concedes that *Tucker Truck* sets forth the correct legal standards for adjudicating whether it forfeited its Section 11701(c) automatic dismissal objection (Pet.9, 21) and further concedes that *Tucker Truck* sets forth principles that have "long been settled" (Pet.21), but argues that the Court should grant certiorari because the court of appeals failed to properly apply the *Tucker Truck* standards to the facts in this case. This Court "rarely" grants certiorari petitions "when the asserted error consists of . . . misapplication of a properly stated rule of law" (Sup.Ct.R. 10) and, in any event, the court of appeals did correctly apply the *Tucker Truck* standards in this case.

1. BNSF argues that the court of appeals misapplied *Tucker Truck* because BNSF did submit its automatic dismissal contentions in a timely manner to the STB. BNSF cites the STB procedural rule stating that "[a] motion to dismiss can be filed at anytime during a proceeding" (49 C.F.R. § 1111.5) and asserts that it complied with this rule by first submitting its automatic dismissal contentions in the form of an argument submitted in its July 14, 2008 reply filing. Pet.22-23.

As BNSF has conceded, it "didn't file a motion to dismiss" with the Board (Oral Arg. Tr. 7), so the only significance of the cited dismissal rule is that BNSF did not invoke it in the STB proceedings. Moreover, even assuming, as BNSF contends, the argument it presented in its July 2008 reply was "effectively" a motion to dismiss (*id.*), the fact that a

party can present a dismissal request at any time does not mean that the grounds cited in the request are timely raised.

The court of appeals' decision in *Xcel* demonstrates this point. In that case, Xcel filed a maximum rate complaint at the STB in December 2000. *Id.*, 453 F.3d at 477. Some three and one-half years later, the Board issued a decision in June 2004 awarding rate relief to Xcel. *Id.* BNSF then filed a timely petition for reconsideration where it argued for the first time that Xcel was entitled to no rate relief because, under Section 11701(c), Xcel's case was automatically dismissed in December 2003. *Id.* at 479. The STB did not address BNSF's Section 11701(c) contentions in its reconsideration decision, and BNSF repeated the argument on review. *Id.* at 478-79. The court of appeals held that BNSF's Section 11710(c) objection was forfeit under *Tucker Truck* because it had not been raised in a timely manner before the Board. *Id.* at 479. Thus, in *Xcel*, BNSF filed a timely petition for reconsideration that contained an untimely dismissal request.

Similarly, in another maximum rate case, *AEP Texas*, BNSF filed a notice at the STB on July 25, 2006 claiming that the case, which was far from being completed, was going be automatically dismissed 16 days later on August 10, 2006 under Section 11701(c) as that date marked the three-year anniversary of the date of the filing of the shipper's complaint. The Board accepted BNSF's notice, but held, *inter alia*, that BNSF had waived its automatic dismissal request by presenting it in an unfair and untimely manner. JA260. As in *Xcel*, BNSF's filing

was not out of time, but BNSF's request for dismissal under Section 11701(c) contained in the filing was found untimely.

2. BNSF's Section 11701(c) contentions were clearly raised in an untimely manner in *WFA*. SAC cases are extraordinarily complicated. The timing of the submission of evidence and argument in SAC cases is governed by Board-prescribed procedural schedules. *See, e.g.*, 49 C.F.R. § 1111.8 (setting forth the governing procedural schedules in SAC cases "[a]bsent a specific order by the Board"); *General Procedures for Presenting Evidence in Stand-Alone Cost Rate Cases*, STB Ex Parte No. 347 (Sub-No. 3), 2001 WL 240000 (STB served Mar. 12, 2001) (adopting procedural guidelines to apply in SAC cases) ("*General Procedures*"). As pertinent here, the STB held in its *September 2007 Decision* that if WFA elected to revise its SARR, the Board would reopen the record for the limited purpose of permitting WFA to submit supplemental revised SARR evidence, and for BNSF to respond to this revised SARR evidence, but expressly directed the parties not to litigate any "unrelated issues." JA325. The Board's *September 2007 Decision* also contained a "specific order" (see 49 C.F.R. § 1111.8) to govern the timing of any challenges to the Board's supplemental evidence ruling: all "technical or substantive" errors in the Board's decision were to be presented to the Board in the form of a petition for reconsideration to be filed by October 1, 2007 (Pet.App.31a. n.28), a date the Board later extended to October 22, 2007.

BNSF was aware that if WFA elected to submit supplemental evidence, the proceeding would

extend beyond the putative automatic dismissal date of October 19, 2007, but, as it conceded, BNSF did not raise its automatic dismissal contentions in its petition for reconsideration, which it submitted to the Board on October 22, 2007, but instead waited for ten months after the *September 2007 Decision* before first raising them on July 14, 2008 (Pet.App.16a). BNSF's dismissal claims were thus clearly untimely under the governing procedural schedule crafted by the Board for application in *WFA*. When asked by the court of appeals why it did not present its Section 11701(c) contentions in its October 22, 2007 reconsideration petition, BNSF claimed that it thought the *September 2007 Decision* was a final decision denying all rate relief to WFA. The court of appeals found this excuse did not "negate the forfeiture" because "[t]he September 2007 Decision indicated on its face it was not a final decision." Pet.App.16a.

Moreover, the Board has developed, through case-by-case adjudication, additional procedural rules governing the timing and manner that SAC arguments can be presented to the Board, including rules that preclude parties from sandbagging – *i.e.*, presenting evidence or arguments that "could and should" have been presented at an earlier stage in the proceedings. *General Procedures*, 2001 WL 240000 at *3; *accord Tex. Mun. Power Agency v. Burlington N. & Santa Fe. Ry.*, STB Docket No. 42056, 2004 WL 2619767 at *3 (STB served Sept. 27, 2004) (rejecting argument that "could have and should have been presented in the earlier stages of the proceeding"). And, prior to the decision below,

both the STB and the court of appeals had specifically found that BNSF's sandbagging of its Section 11701(c) automatic dismissal contentions was not permissible in a SAC case.

In *AEP Texas*, the STB held that BNSF "waived" its Section 11701(c) objection, raised 16 days prior to the putative three-year dismissal date, "through its course of conduct in this case" including agreeing to an "extended schedule" for the receipt of evidence beyond the asserted three- year dismissal date. *Id.*, 2006 WL 3290425 at *5. JA265. Similarly, in *Xcel*, the court of appeals held that BNSF forfeited its Section 11701(c) objection, raised six months after the putative three-year dismissal date, and after the Board had awarded some rate relief to the complainant shipper, because BNSF "could have and should have" raised the argument earlier in the proceedings and because any failure on the part of the Board to decide the case within three years "was induced by BNSF's own failure to raise the argument in good time." *Id.*, 453 F.3d at 479 (internal quotation omitted).

The court of appeals determined that BNSF had engaged in the same types of sandbagging tactics in *WFA* that led to the court's finding of forfeiture in *Xcel*: BNSF waited until long after the putative statutory deadline expired before raising its automatic dismissal contentions; BNSF did not raise the contentions until it was clear the Board was going to afford the complainant shipper some rate relief; and, prior to invoking the dismissal claim, BNSF gave no indication in the STB proceedings that it was going to raise the defense, despite having

multiple opportunities to do so. Pet.App.16a-17a. Finding a forfeiture on these facts was clearly the correct result and one that fully comports with SAC standards precluding sandbagging.

3. The court of appeals' ruling on BNSF's forfeiture also advances the policy objectives underlying the *Tucker Truck* decision. In that case, a party to an ICC proceeding possessed a procedural objection – the hearing examiner that initially heard the case had not been appointed in the manner required by the Administrative Procedure Act, 5 U.S.C. § 551 et seq. ("APA") – but first raised the objection in a court following its loss on the merits at the ICC despite having "many opportunities during the administrative proceeding" to raise the issue. *Tucker Truck*, 344 U.S. at 35. The district court set aside the ICC's order based on the belatedly raised APA argument. In reversing the district court's decision, this Court emphasized that one of the principal policy reasons for requiring parties to timely raise procedural arguments at the ICC was to give the ICC a chance to cure the procedural defect prior to ruling on the merits, thus lessening the need for judicial review of procedural challenges to agency action. *See id.* at 37 ("orderly procedure and good administration require that objections to proceedings of an administrative agency be made while it has opportunity for correction in order to raise issues reviewable by the courts"). The Court further held that this policy applied even in cases where the ICC "had a predetermined policy" on the procedural challenge because the agency might decide to change the policy. *Id.*

In this case, the STB has long held that the three-year automatic dismissal rule set forth in Section 11701(c) does not apply to shipper-initiated rate complaint cases. Pet.App.36a. If a party like BNSF wants to challenge the application of that construction in a particular case, *Tucker Truck* instructs that the objection be made when the agency has an "opportunity for correction." *Id.* at 37. That policy cannot be achieved where, as here, BNSF waits until long after the asserted statutory deadline has expired before asserting the statutory defense. Moreover, the Court also emphasized in *Tucker Truck* that the untimely procedural objection raised in that case was made "clearly [as] an afterthought, brought forward at the last possible moment to undo the administrative proceedings without consideration of the merits and can prevail only from technical compulsion irrespective of considerations of practical justice." *Id.* at 36. BNSF's Section 11701(c) objection, like the objection at issue in *Tucker Truck*, was similarly brought forward as an "afterthought . . . at the last possible moment" in a transparent effort to strip WFA of its rate relief, and the court of appeals' decision finding BNSF's objection forfeit advances "considerations of practical justice." *Id.*

4. BNSF contends that the court of appeals' forfeiture decision conflicts with this Court's decision in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978) ("*Vermont Yankee*"). Pet.21-24. In *Vermont Yankee*, the court of appeals overturned an agency rulemaking decision "because of the perceived

inadequacies of the procedures employed in the rulemaking proceedings." *Id.* at 541. This Court reversed, holding that the rulemaking procedures employed by the agency conformed to requirements set forth in the APA, and that the court of appeals was not free to dictate different procedures than those set forth in the APA. *Id.* at 548-49. "*Vermont Yankee* stands for the general proposition that courts are not free to impose upon agencies specific procedural requirements that have no basis in the APA." *Pension Benefit Corp. v. LTV Corp.*, 496 U.S. 633, 654 (1990).

The court of appeals' decision does not conflict with *Vermont Yankee*. First, the court of appeals did not address, much less find, that the procedures used by the STB in the *WFA* case were deficient. Second, the court of appeals did not remand the case for the STB to employ new procedures. Third, this case does not involve a dispute between the court and the agency over agency procedural practice. The STB urged the court of appeals to find that BNSF had failed to raise its automatic dismissal contentions in a timely manner before the Board and the court of appeals agreed. Fourth, the result reached by the court of appeals fully complies with governing STB procedural rules and decisions.

II. THE COURT OF APPEALS CORRECTLY FOUND THAT WFA AND THE BOARD DID NOT FORFEIT THEIR RIGHT TO ARGUE THAT BNSF FORFEITED ITS SECTION 11701(c) CONTENTIONS

Alternatively, BNSF argues that even if it failed to raise its Section 11701(c) automatic dismissal contentions in a timely manner before the Board, the court of appeals should have found that the Board, and WFA, forfeited their right to argue BNSF's forfeiture. Pet.12-20. BNSF's "forfeiture-of-forfeiture" contentions raise no issues that merit review by this Court.

1. Resolution of the issue whether a party forfeits an appellate forfeiture defense is committed to the sound discretion of the appellate court. Pet.App.17a. The court of appeals properly exercised its discretion in holding that the STB and WFA did not forfeit their right to argue BNSF's forfeiture in this case.

The court of appeals ruled that the STB and WFA did not forfeit their forfeiture defense because the Board "never acquiesced in BNSF's view" that Section 11701(c) applied in shipper-initiated rate cases and had "rejected BNSF's argument on the merits when it was first raised in July 2008." Pet.App.17a. BNSF does not dispute these findings, nor does BNSF point to any record evidence where WFA, or the Board, agreed to waive any defenses to BNSF's Section 11701(c) contentions, including a defense based on the *Tucker Truck* forfeiture rule.

2. BNSF argues that the court of appeals should have found that WFA and the Board forfeited, *sub silentio*, their right to rely on BNSF's forfeiture because the Board rejected BNSF's Section 11701(c) automatic dismissal contentions as meritless without addressing whether the contentions were raised in a timely or otherwise impermissible manner, and asks this court to grant certiorari to address a purported conflict in the circuits related to the resolution of this issue. Pet.12-20. However, the conflict here is one manufactured by BNSF.

The STB is a regulatory agency that administers the transportation laws generally codified at 49 U.S.C. § 10101 *et seq*. In the administration of these laws, the Board principally serves as an impartial judge resolving disputes between shippers and rail carriers concerning rail rates, practices and other matters Congress has directed the Board to regulate. Since the agency's creation in 1996, the issue whether the STB waives an appellate forfeiture argument by deciding the merits of the forfeited argument has arisen in only one other case involving the STB, *Otter Tail Power Co. v. STB*, 484 F.3d 958 (8th Cir. 2007) ("*Otter Tail*"). As BNSF acknowledges (Pet.16), the Eighth Circuit held in *Otter Tail* that the STB did not forfeit the appellate argument.

In *Otter Tail*, the complainant shipper asked the Board to overturn a SAC "cross-subsidy" standard the Board had adopted in another SAC case. *Id.*, 484 F.3d at 963. The Board rejected the shipper's argument on the merits without addressing

whether it had been properly raised before the agency, and the shipper petitioned for review, *inter alia*, of the Board's ruling on the cross-subsidy issue. On review, the STB argued that the shipper had forfeited the cross-subsidy argument because the shipper had not presented the argument in a timely manner to the Board. The Eighth Circuit agreed. *Id.* In so holding, the Eighth Circuit did not find that the STB had "forfeited" its appellate forfeiture argument by deciding the merits of the shipper's cross-subsidy argument.

The results reached by both the D.C. Circuit and the Eighth Circuit reflect proper application of forfeiture principles in STB rate cases litigated under the Board's SAC test. SAC cases call upon the Board to resolve hundreds of disputed issues of fact and law on records that are mind-bogglingly immense. In WFA's case, the record consisted of over 12,000 pages of hard-copy evidence, argument, workpapers, and supporting data, along with over 30 gigabytes of electronic spreadsheets, workpapers and supporting data. In resolving this multitude of issues, the STB can easily decide one or more issues on the merits, while inadvertently overlooking a threshold question of whether the issue has been properly presented. In the instant case, WFA argued in the STB proceedings that the Board should not reach the merits of BNSF's automatic dismissal contentions because BNSF had failed to raise them in a fair and timely manner. JA578. The Board appears to have inadvertently overlooked this contention, and did not address it in its merits decisions, but the Board's failure should not preclude

a reviewing court from reaching the timeliness issue, particularly where, as here, the STB agrees that BNSF's Section 11701(c) automatic dismissal contentions were not presented in a timely manner before the Board, and requests a finding of appellate forfeiture.

3. In the absence of any conflicting courts of appeals' decisions concerning forfeiture rulings in cases involving the STB, BNSF attempts to manufacture a pertinent "conflict" by citing waiver rulings in cases involving principally federal employment discrimination claims and federal immigration law claims. Pet.15-20. The courts of appeals have taken at least four different approaches in resolving the issue of whether a federal agency that has issued a final decision denying the merits of an untimely raised employment discrimination claim, without addressing the timeliness of the claim, waives a timeliness defense after the claimant brings suit in federal district court. *See Boyd v. United States Postal Serv.*, 752 F.2d 410, 414 (9th Cir. 1985) ("*Boyd*") (agency waives defense if it makes an administrative "finding of discrimination"); *Rowe v. Sullivan*, 967 F.2d 186, 191 (5th Cir. 1992) (agency waives defense only if it "make[s] a specific finding that the claimant's submission was timely"); *Marquardt v. Leavitt,* 294 Fed. Appx. 112 (5th Cir. 2008), *cert. denied sub nom. Marquardt v. Sebelius*, 130 S. Ct. 361 (2009) ("*Marquardt*") (same); *Bowden v. United States*, 106 F.3d 433, 439 (D.C. Cir. 1997) (agency waiver turns on a case-by-case "balancing of

equities"); *Ester v. Principi*, 250 F.3d 1068, 1072 (7th Cir. 2001) (agency waives defense).

In *Marquardt*, the United States argued that the position attributed to the 9th Circuit in *Boyd* – *i.e.*, a waiver exists only if the agency makes a specific finding of discrimination – was the correct legal standard. *See* Brief for the Respondent in Opposition at 8 (No. 08-1048). Clearly, the instant case is not the appropriate vehicle to address and resolve the proper waiver standards to apply in employment discrimination cases. WFA also points out that the Court recently declined the opportunity to address employment case waiver issues by denying the petition for a writ of certiorari in *Marquart*. *Id.*, 130 S. Ct. 361.

Similarly, the courts of appeals have differed in their response to the question of whether a Board of Immigration Appeals ("BIA") decision rejecting on the merits a claim not properly presented to it by an alien in a removal proceeding is subject to judicial review under 8 U.S.C. § 1252(d)(1) ("court may review final order of removal only if . . . the alien has exhausted all administrative remedies"). *See, e.g.*, *Amaya-Artunduaga v. Att'y Gen.*, 463 F.3d 1247, 1250-51 (11th Cir. 2006) (court lacks jurisdiction to consider a claim not properly raised before the BIA even if the BIA decides the merits of the claim *sua sponte*); *Sidabutar v. Gonzales*, 503 F.3d 1116, 1122 (10th Cir. 2007) (court has jurisdiction to consider a claim not properly raised before the BIA if the "BIA issues a full explanatory opinion" addressing the issue but not "where the BIA summarily affirms [an immigration judge's] decision"); *Abebe v. Gonzales*,

432 F.3d 1037, 1040-41 (9th Cir. 2005) (en banc) (court has jurisdiction to consider a claim not properly raised before the BIA, *inter alia*, if the BIA summarily affirms an immigration judge's decision addressing the issue).

The courts of appeals have also reached differing conclusions on the related question of whether issue exhaustion under Section 1252(d)(1) is a jurisdictional requirement. *See Lin v. Att'y Gen.*, 543 F.3d 114, 120 n.6 (3rd Cir. 2008) (discussing this conflict and observing that "a number of our sister courts of appeals have struggled with" this question). Since resolution of these questions involves "unsettled questions of immigration law" (*Zine v. Mukasey*, 517 F.3d 535, 539 (8th Cir. 2008)), this case is not an appropriate vehicle to consider them.

4. Moreover, the employment discrimination and immigration cases cited by BNSF involve cases where a claimant is seeking relief from a federal agency and the forfeiture issues, generally speaking, are whether the claimant has followed governing claim processing rules and if it has not, whether the agency has forfeited that defense by deciding the claimant's request for relief on the merits, a forfeiture that adversely impacts the agency, not the claimant. In the instant case, there is no issue concerning whether WFA followed the governing procedural rules – it clearly did – and WFA also asked the Board to find that BNSF had waived its belatedly raised Section 11701(c) objections. If the STB is found to have forfeited the right to argue that BNSF's Section 11701(c) contentions are forfeit because the STB rejected these contentions on the

merits without also finding they were not properly raised, WFA unfairly loses the forfeiture defense due to the agency's failure to address WFA's timely raised objection that BNSF waived its Section 11701(c) contentions by not presenting them in a fair or timely manner to the Board.

5. BNSF argues the court of appeals erred by impermissibly "affirm[ing]" the STB's decision on grounds not relied upon by the Board and by not "defer[ing] to [the STB's] waiver of its own rules of procedure." Pet.2, citing *SEC v. Chenery Corp.*, 332 U.S. 194 (1947) ("*Chenery*") and *Weinberger v. Salfi*, 422 U.S. 479 (1975). BNSF's argument rests on faulty premises. The court of appeals did not affirm the merits of the Board's ruling rejecting BNSF's automatic dismissal contentions; it found instead that BNSF had forfeited its right to judicial review of the merits of that issue. *See ICC v. Bd. of Locomotive Eng'rs*, 482 U.S. 270, 283 (1987) ("*Chenery* has nothing whatever to do with *whether agency action is reviewable*"). Also, there is no evidence in the administrative record that the STB intended to waive its procedural rules, nor, of course, can the STB waive procedural rules, like its SAC case rules, that are intended "to confer important procedural benefits" on coal shippers. *Am. Farm Lines v. Black Ball Freight Serv.*, 397 U.S. 532, 538 (1970).

Assuming *arguendo* that the court of appeals did "affirm" the Board's rejection of BNSF's automatic dismissal contentions, this result is perfectly permissible under *Chenery* on the facts of this case. The STB argued forcefully in the court of

appeals that BNSF had forfeited these contentions by failing to raise them in a fair and timely manner before the Board and it is clear that the STB would have reached the same conclusion on remand. *See NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 766-67 n.6 (1969) (plurality opinion) ("*Chenery* does not require that [courts] convert judicial review of agency action into a ping-pong game" by requiring remand where it "would be an idle and useless formality").

III. THIS CASE DOES NOT INVOLVE FREQUENLTY RECCURING ISSUES OF NATIONAL IMPORTANCE

This case does not raise any recurring issues of national importance meriting review by this Court.

1. BNSF argues that the forfeiture-of-forfeiture issue it raises occurs frequently in the federal courts. Pet.24. In fact, this issue has arisen only twice in cases involving review of STB orders – this case and *Otter Tail* – and in each case the appellate court held that the STB did not forfeit its forfeiture contentions by deciding the merits of the forfeited issue. Moreover, as discussed above, this case is not the proper vehicle to address forfeiture-of-forfeiture issues involving other agencies, other statutory schemes, and different facts.

2. Similarly, the Section 11701(c) automatic dismissal contentions BNSF raises are not ones that frequently occur. The STB, and the ICC before it, have consistently, and correctly, construed Section

11701(c), and its statutory predecessors, as not applying in rate cases initiated by shippers. *See AEP Texas*, 2006 WL 3290425 at *2-*4 (JA261-65); *1983 Interpretation*, 367 I.C.C. at 407-12. This construction of Section 11701(c) complies with the text and legislative history of Section 11701(c) and, as both agencies emphasized, a contrary reading would violate a complainant shipper's due process rights in cases where, as here, the agency failed to finally decide the case in three years through no fault of the shipper. *Id.*[5]

Since the STB was created in 1996, only BNSF has argued that Section 11701(c) applies in rate complaint cases and BNSF has advanced this claim only in three coal rate cases: *Xcel*, *AEP Texas*, and *WFA*. In each of these cases, BNSF attempted to spring the defense either long after, or just before, the asserted dismissal date, in transparent and unsuccessful efforts to strip the complainant shippers of their most basic due process right in a rate case – a fair hearing and final decision on their complaints. The only recurring issue here is BNSF's attempt to misuse Section 11701(c) as a last gasp sandbag defense to strip shippers of their due process rights.

3. Finally, BNSF asserts this case is worthy of review by this Court because the Board awarded WFA "the largest reparations order ever entered by the STB." Pet.1. However, the size of the Board's

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[5] The court of appeals' decision sets forth a detailed summary of the STB's reasonable construction of Section 11701(c), as well as BNSF's impermissible construction. Pet.App.11a-14a.

award is not surprising given BNSF's attempt to unilaterally implement one of the largest rate increases ever imposed on a rail shipper, and the fact that WFA had to pay BNSF's increased rates for several years while the case was being litigated before the Board. Moreover, in its rate relief orders, the Board permitted BNSF to raise its rates substantially on WFA's traffic to highly remunerative levels, but not to the full monopoly levels BNSF sought to impose. BNSF may not be happy with this result, but the Board's resolution of WFA's complaint, and the court of appeals review of that resolution, does not raise any recurring issues of national importance.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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